



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 27, 2002

Mr. Michael Greenberg
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78765-3199

OR2002-7399

Dear Mr. Greenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173368.

The Texas Department of Health (the "department") received a request for information pertaining to Youth Light 2010, Incorporated. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.110, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that some of submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Certain stapled documents entitled "Establishment Inspection Reports" and "Complaint and Injury Report" are expressly public under section 552.022(a)(1). Therefore, you may only withhold this information if it is excepted under section 552.108 or is confidential under other law. You do not argue that the submitted information is excepted under section 552.108. Although you argue that the submitted information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and therefore is not "other

law” for purposes of section 552.022.¹ However, you argue that portions of the information contained in the reports are confidential under sections 552.110, 552.136 and 552.137. We will therefore address the applicability of these exceptions to the required public disclosure of the submitted information.

You indicate that a customer list of Samnani Corporation (“Samnani”) is excepted from disclosure under section 552.110. An interested third party is allowed 10 business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received from Samnani any arguments for withholding this customer list. Moreover, you do not provide any arguments as to why this list is excepted under section 552.110. We thus have no basis for concluding that this information is excepted from disclosure. *See e.g.*, Gov’t Code § 552.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Therefore, the department may not withhold the customer list in order to protect Samnani’s proprietary interest. Nor can we conclude that any other exception to disclosure applies to the customer list. Accordingly, the department must release the submitted customer list to the requestor.

We next note that the Establishment Inspection Reports contain information made confidential under section 552.136. Section 552.136 provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code §552.136. We have marked the information that the department must withhold under section 552.136.

You assert that the Establishment Inspection Reports contain e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." See Gov't Code § 552.137(a). As there is no indication that the individuals to whom the e-mail addresses belong have consented to their release, the department must withhold the e-mail addresses in the submitted information that we have marked under section 552.137 of the Government Code. See Gov't Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release).

We turn now to your section 552.103 arguments for the remainder of the submitted information. Section 552.103(a) provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On

the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you state that the "entire case is being referred to the Attorney General's litigation section for appropriate enforcement." Accordingly, based on your representation and our review of the remaining information, we conclude that the department has demonstrated that litigation was pending at the time the request was received. We also find that the department has demonstrated that the remaining information is related to the pending litigation for purposes of section 552.103(a). Therefore, the department may withhold the remaining information under section 552.103.

However, we note that the opposing party has seen portions of the information. If the opposing parties in the litigation have seen or had access to any of the information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW- 575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must release to the requestor the Establishment Inspection Reports and Complaint and Injury Report with the following exceptions. An access device number is confidential under section 552.136. Also, e-mail addresses in the submitted reports are excepted from disclosure under section 552.137. The department may withhold the remaining information from disclosure under section 552.103. We note, however, that if the opposing parties have seen or had access to any of the information, there is no section 552.103(a) interest in withholding it from disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

VGS

V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/lmt

Ref: ID# 173368

Enc: Submitted documents

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